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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1467

WALL STREET TRANSCRIPT CORPORATION
BY RICHARD A. HOLMAN, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–27a) is not yet officially reported. The opinion of the district court (Pet 28a–46a) is reported at 294 F. Supp. 298.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1970. The petition for a writ of certiorari was filed on April 23, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Securities and Exchange Commission may enforce through judicial proceedings a subpoena issued in an investigation to determine if a publication that reprints investment advice is an investment adviser under the Investment Advisers Act of 1940.

STATUTE INVOLVED

The pertinent provisions of the Investment Advisers Act of 1940 are set forth at Pet. App. 48a–58a.

STATEMENT

On November 22, 1968, the District Court for the Southern District of New York denied an application by the Securities and Exchange Commission for enforcement of a subpoena duces tecum directed to petitioner (App. 266a[1]) and on December 24, 1968, denied the Commission's motion for reargument or clarification (App. 274a). The court of appeals reversed these orders, noting that on remand the petitioner was of course "free to ask the district court for appropriate protective limitations" should "the production of materials sought by the Commission's subpoena * * * threaten any unusual disruption of * * * [petitioner's] normal operations * * *" (Pet. 20a).

The subpoena had been issued in connection with an investigation ordered by the Commission pursuant to Section 209(c) of the Investment Advisers Act ("Advisers Act") as to the facts and circumstances

[1] "App." refers to the appendix in the court of appeals.

relating to an apparent violation of Section 203, the registration provision of the Advisers Act, by the petitioner, the Wall Street Transcript Corporation. The subpoena directed Richard A. Holman, petitioner's principal operating officer, to appear and produce certain documents and records (App. 17a–19a, 79a–80a). The Commission had ordered the investigation in July 1967, after its staff had reported information to it tending to show that the Wall Street Transcript ("Transcript"), which petitioner publishes, was an investment advisory publication within the meaning of Section 202(a)(11) of the Advisers Act. Petitioner was not registered as an investment adviser (App. 16a).

The Transcript is published weekly and sold at $5 an issue or by subscription for $180 a year (App. 143a). The major portion of each issue is devoted to securities reports and analyses originally published by registered broker-dealers and investment advisers. It ostensibly prints them "in toto, without comment, states the name of the author of the information, and disclaims any advocacy thereof" (App. 97a–98a). The publication also contains some management speeches, company studies and other reports. Advertisements to sell the Transcript have appeared in the *Wall Street Journal*, the financial section of the *New York Times* and in *Barron's* (App. 90a). These advertisements have had headings such as "WHICH SHOULD YOU BUY—NOW?" (App. 142a), "ALL IN FULL ORIGINAL TEXT — BUY-SELL-HOLD-SWITCH RECOMMENDATIONS * * *" (App.

148a). Such headlines are frequently followed by an index of numerous companies as to which the Transcript has securities analyses and the advertisements conclude: "You'll be surprised how THE WALL STREET TRANSCRIPT can help you maximize your profit potential" (App. 150a).

On July 29, 1968, Holman, accompanied by counsel, appeared in response to the Commission's subpoena. After being advised of the nature of the Commission's investigation and being sworn, he refused either to answer any questions, other than to give his name, addresses and telephone numbers (App. 59a 67a–69a), or to produce the documents subpoenaed (App. 39a). Holman did not assert a privilege against self-incrimination, but based his refusal to comply with the subpoena on the grounds that the Commission's inquiry was not authorized by the Advisers Act and not permitted by the First and Fourth Amendments to the Constitution (App. 49a, 63a–64a).

ARGUMENT

The decision of the court of appeals was correct and does not conflict with decisions of this Court or of other courts of appeals. The constitutional issues raised are based primarily upon an erroneous characterization of the Investment Advisers Act as a statute authorizing "censorship" (Pet. 13–16) and upon an assumption of the very fact which the Commission's investigation seeks to discover—whether the petitioner's publication is a "bona fide newspaper" and thus within the statutory exemption therefor in Section 202(a)(11)(D). Since the statute involved has basically only disclosure and antifraud provisions, this case is

controlled by the holdings of this Court that an agency's statutory power to investigate possible violations of the laws it administers includes the power to determine whether the statute covers a particular entity. See, *e.g., Endicott Johnson Corp. v. Perkins,* 317 U.S. 501; *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186; *Federal Trade Commission* v. *Crafts,* 355 U.S. 9, *reversing per curiam* 244 F. 2d 882 (C.A. 9). As held in *Oklahoma Press,* there is no exception to this general rule because the object of the investigation may be a newspaper.

1. There is no element of censorship in the Investment Advisers Act. This Court has pointed out that this statute was "designed to eliminate certain abuses in the securities industry, abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's."[2] The Act regulates the business of providing investment advice by requiring the registration of persons in that business as a prerequisite to their use of the mails and channels of interstate commerce (Section 203(a)). Registration is effected by filing an application containing information set forth in Section 203(c) of the Act, which has been summarized as

> information concerning the adviser's name, form and place of organization; the location of its offices, the names and addresses of its partners, officers and directors; the number of its employees; the nature of its business; the nature and scope of its authority with respect to

[2] *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 186 (footnote omitted).

> clients' funds and accounts; the basis of its compensation; any record with respect to convictions or injunctions involving securities; and the education and business affiliations for the past ten years of the adviser and any partners, officers, directors and controlling persons.[3]

Unless the Commission, after notice and opportunity for hearing, finds that some specified statutory disqualification is present and that, in addition, it is in the public interest to deny registration,[4] registration is automatically effective 30 days after the filing of the application.[5] The statutory grounds for denial of reg-

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[3] II Loss, *Securities Regulation* 1394 (2d ed. 1961), as supplemented V Loss, *Securities Regulation* 3511 (1969).

[4] Section 203(d).

[5] Section 203(c). This section also provides that the Commission can declare the registration effective within a shorter period of time.

Section 203(e) provides that the commencement of a proceeding to deny registration postpones the effective date of registration for a 90-day period or until final determination of the proceeding, whichever first occurs. It provides, however, that if

> after appropriate notice and opportunity for hearing, it shall appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors to postpone the effective date of such registration beyond such ninety-day period and until final determination of whether such registration shall be denied, the Commission shall so order. Upon request of any interested party, made more than ninety days after the effective date of such order, the Commission shall consider whether such postponement should continue, and shall take such action, if any, with respect thereto as in its discretion is necessary or appropriate in the public interest or for the protection of investors.

The quoted language is apparently the only basis for petitioner's repeated contention that the "issuance of the license may be indefinitely deferred" (Pet. 12, 15–16).

istration (and for suspension or revocation of a registration that has become effective) all involve willful violations of the federal securities laws or otherwise require evidence of specific unlawful conduct by the proposed registrant or by certain affiliated persons.[6] The few substantive provisions of the Act, which are summarized in the margin,[7] are designed to eliminate

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[6] Essentially, registration may be denied, suspended or revoked upon findings that the adviser or an affiliated person (1) has filed false reports with the Commission under the Act; (2) has been convicted within ten years of any felony or misdemeanor involving either securities or mail fraud violations; (3) is permanently or temporarily enjoined by any court of competent jurisdiction from acting as, among other things, an investment adviser, underwriter, broker, or dealer; (4) has wilfully violated any provision of the Act or of the Securities Act or Securities Exchange Act; or (5) has aided, abetted or counseled such a violation by any other person. Section 203(d). Even if the Commission finds any one or more of these disqualifications is present, it may deny registration or suspend or revoke a registration already effected only if it also finds it is "in the public interest" to do so. *Ibid.*

[7] Section 205, 15 U.S.C. 80b–5, regulates the terms of advisory contracts an investment adviser may enter into.

Section 206, 15 U.S.C. 80b–6, enumerates certain transactions in which investment advisers may not engage. That section makes it unlawful for any investment adviser to employ any device, scheme or artifice to defraud any client or prospective client; to engage in any transaction, practice or course of business which operates as a fraud or deceit; to fail to disclose to a client that he is acting as broker for another person; or to engage in any act, practice, or course of business which is fraudulent, deceptive or manipulative. Pursuant to Section 206 (4), the Commission has promulgated rules governing advertisements by investment advisers and the custody or possession of funds or securities of clients.

Section 207, 15 U.S.C. 80b-7, makes unlawful any willful misstatement or omission of a material fact in any registration application or report required to be filed with the Commission.

fraudulent conduct and certain specific abuses found to have existed when the statute was enacted. In case of violations, the Commission may institute a proceeding to suspend or revoke registration (Section 203 (d)), may file an injunction action, or may transmit evidence of the violations to the Attorney General, who, in his discretion, may institute criminal proceedings (Section 209 (e)). Any final Commission order is subject to review in the courts of appeals (Sections 213(a) and 214).

The Commission has no authority under this statute to "license" investment advisers, other than its authority to deny, suspend, or revoke a registration on the basis of five specific objective criteria set forth in the statute (n. 6, *supra*). Contrary to the repeated suggestions in the petition (*e.g.*, Pet. 2, 12, 13, 18), the statute authorizes no prior review by the Commission of any oral or written utterances of any investment adviser, whether it be registered or unregistered.

2. Even if a constitutional issue might be presented if the term "bona fide newspaper" as used in the statutory exemption may be less inclusive than the term "press" contained in the First Amendment, the issue is not now ripe for review. Once the Commission's investigation has been completed, the Commission may conclude that the Transcript is a "bona fide newspaper" within the meaning of the statute; if not, the petitioner can raise its First Amendment issues if and when the Commission attempts to enjoin its operations or apply the other statutory sanctions. At that time these issues can then be determined on the basis

of a full and complete factual record. There is accordingly no occasion to determine them at this preliminary stage.

3. The investigation would have no "chilling effect" which would bring it within the scope of this Court's decision in *Dombrowski* v. *Pfister*, 380 U.S. 479, and other cases cited by petitioner. There is thus no justification for a departure from the presumption that Congress intended the agency, not the federal courts, initially to determine the coverage of the regulatory statute pursuant to which the subpoena is issued. In *Dombrowski*, for example, the state officials conducting the investigations under statutes of dubious validity, combined with publicity, had deliberately utilized their investigative authority, to throttle the social and political efforts of petitioners and had participated in an illegal seizure of "documents and records [that had] paralyzed operations and threatened exposure of the identity of adherents to a locally unpopular cause" (380 U.S. at 488–489). In the instant case, as the court of appeals intimated, the Commission has merely attempted to learn the facts about petitioner's business venture by subpoenaing petitioner in a private investigation rather than by making inquiries throughout the investment community, which conceivably might have had a damaging effect upon him (Pet. 19a).[8]

[8] Cf. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 150; *Breard* v. *Alexandria*, 341 U.S. 622, 642; *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178, 191; *Murdock* v. *Pennsylvania*, 319 U.S. 105, 110–111; *Martin* v. *City of Struthers*, 319 U.S. 141, 142 n.1; *Jamison* v. *Texas*, 318 U.S. 413, 417; *Valentine* v. *Chrestensen*, 316 U.S. 52.

The court of appeals properly found that the documentary material sought by the Commission in its investigation was relevant to the question whether the Act covers petitioner's activities and that the Commission's subpoena "does not differ in its effect * * *" from that enforced in the *Oklahoma Press* case, *supra* (Pet. 18a–19a, n.15). The court also made it clear that if during the course of the investigation the production of materials should "threaten any unusual disruption of the *Transcript's* normal operations" the district court may accord it "appropriate protective" remedies (Pet. 20a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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